IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

CAIYUN MU,
Plaintiff-Appellee,

v.

HYOUN MIN OH,
Defendant-Appellant.

Supreme Court No. 2013-SCC-0036-CIV

Superior Court No. 11-0352

ORDER DENYING PETITION FOR REHEARING

Cite as: 2017 MP 4

Decided May 18, 2017

Stephen J. Nutting, Saipan, MP, for Defendant-Appellant.

Victorino DLG. Torres, Saipan, MP, for Plaintiff-Appellee.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; JOSEPH N. CAMACHO, Justice Pro Tempore.

CASTRO, CJ.:

¶ 1 Defendant-Appellant-Petitioner Hyoun Min Oh ("Oh") petitions for a rehearing of the Court's decision in *Caiyun Mu v. Hyoun Min Oh*, 2015 MP 18. For the reasons stated below, we DENY the petition.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 In 2015, this Court considered Oh's appeal of the trial court's judgment finding her negligent in operating her vehicle. Oh appealed on four grounds arguing: 1) the evidence was insufficient to find negligence; 2) the trial court erred in denying her motion for a directed verdict and judgment notwithstanding the verdict; 3) the jury erred in failing to find Plaintiff-Appellee-Respondent Caiyun Mu ("Mu") contributorily negligent; and 4) she was denied a fair trial because Mu's counsel improperly utilized a demonstrative aid in closing argument and advanced improper arguments appealing to the jury's passion and prejudice. In its opinion, the Court held the trial court did not err and affirmed the court's ruling.

¶ 3 Oh requests we rehear the Court's decision.

II. DISCUSSION

¶ 4 Oh argues the Court erred in 1) concluding that Oh's fair trial claim was insufficiently developed; 2) applying the plain error standard to determine claims of improper argument; 3) placing the burden on Oh to demonstrate that the improper statements affected the outcome of the proceeding; and 4) concluding the trial court did not abuse its discretion in permitting the use of demonstrative aid in closing argument.

¶ 5 A petition for rehearing is a discretionary appeal. *See* NMI SUP. CT. R. 40(a)(4) (noting if petition is granted, the Court may make a final decision, restore the case for re-argument, or issue any other appropriate order). The petitioner must first meet the initial threshold of demonstrating with particularity a point of law or fact the Court erred, overlooked, or misapprehended. NMI SUP. CT. R. 40(a)(2). A petition for a rehearing is not an opportunity for a second bite of the apple; the petitioner cannot rehash the same arguments already heard and decided on appeal. *N. Marianas Coll. v. Civil Serv. Comm'n*, 2007 MP 30 ¶ 2 (citing *In re Estate of Deleon Guerrero*, 1 NMI 324, 326 (1990)). Nor can the petitioner raise new issues for the first time on rehearing, absent extraordinary circumstances. *Id.* When the petitioner meets the initial threshold, the Court may hear the petition. If the Court determines it erred, overlooked, or misapprehended a legal issue or factual matter, the Court may then grant the petition and: "[m]ake a final decision of the case without re-argument; [r]estore the case to the calendar for re-argument or resubmission; or [i]ssue any other appropriate order." NMI SUP. CT. R. 40(a)(4)(A)–(C).

¶ 6 Because Oh met the initial threshold of particularizing each point of law or fact she believes the Court has erred or overlooked, we consider the issues raised in her petition below.

A. Fair Trial Claim

¶ 7 Oh argues the Court erred in concluding her fair trial claim was insufficiently developed on appeal. Oh asserts she devoted five pages of her opening brief discussing the fair trial claim related to Oh's interests in poker establishments and her arguments were amply supported by case law.

¶ 8 In *Commonwealth v. Guiao*, we stated "[a]sserting a contention, citing a case, then offering a conclusion, without offering applicable [legal] analysis, is deficient." 2016 MP 15 ¶ 13. While Oh devoted nearly five pages discussing the fair trial claim in her brief, she failed to meaningfully apply the facts of her case to the authorities cited. Oh quoted extensive portions of the trial transcripts then offered arguments without sufficient legal analysis. Accordingly, pursuant to *Guiao*, the Court did not err when it concluded the issue was insufficiently developed.

B. Plain Error Standard of Review

¶ 9 Oh argues the Court erred in applying the plain error standard to determine whether the improper arguments advanced by Mu's counsel, including references to Oh as a hostile witness, use of golden rule arguments, and pandering to the jury's emotions, denied her a fair trial. She asserts no other jurisdiction in the United States reviews claims of improper argument under the plain error standard. However, Oh does not articulate which standard is appropriate.

¶ 10 We find Oh's argument unavailing. "The overwhelming weight of the authority supports the rule that, when no timely objection is made, claims of improper . . . argument are . . . amenable to review for plain error." *Smith v. Kmart Corp.*, 177 F.3d 19, 25 (1st Cir. 1999); *see also Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503, 517 (9th Cir. 2004) ("We thus review for plain or fundamental error where no contemporaneous objection was made."); *Oxford Furniture Cos. v. Drexel Heritage Furnishings, Inc.*, 984 F.2d 1118, 1128 (11th Cir. 1993) ("When no objections are raised, we review the arguments for plain error, but a finding of plain error is seldom justified in reviewing argument of counsel in a civil case." (citation and internal quotation marks omitted)); *Thomure v. Truck Ins. Exch.*, 781 F.2d 141, 143 (8th Cir. 1986) ("When statements in a closing argument are not objected to at trial, we may only review them on a plain error standard."). "Plain error is a 'rare species in civil litigation,' encompassing only those errors that reach the 'pinnacle of fault' . . . ." *Smith*, 177 F.3d at 26.

¶ 11 The plain error standard imposes a "high threshold" on claims of improper argument absent contemporaneous objection because raising an objection at trial allows the trial judge "to examine the alleged prejudice and to admonish . . . counsel or issue a curative instruction, if warranted" and "allowing a party to wait to raise the error until after the negative verdict encourages that

party to sit silent in the face of claimed error." *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1193 (9th Cir. 2002) (internal citation and quotation marks omitted).[1] In *Hemmings*, a defendant appealed from a judgment involving an employment discrimination action, arguing the plaintiff's counsel made improper remarks during closing argument. *Id.* at 1192. Because the defendant failed to object to the remarks at trial, the reviewing court in *Hemmings* held the plain error standard applies. *Id.* at 1193. It noted the high threshold is appropriate because the trial court is in a better position to determine whether the alleged misconduct necessitates curative instruction. *See id.* As the overwhelming authority supports the plain error standard absent contemporaneous objection in a civil trial, we conclude the Court did not err in applying the plain error standard.

C. Burden of Proof

¶ 12 Oh asserts even if the plain error standard is correct, she should not bear the burden of demonstrating prejudice. Oh argues a party aggrieved by improper argument does not bear the burden to show that the argument was prejudicial. Instead, she asserts prejudice is presumed, and thus, Mu had the burden to negate prejudice on appeal.

¶ 13 Oh is mistaken. This Court has held "[t]o receive relief under the plain-error standard, an appellant must show that: (1) there was an error; (2) the error was plain or obvious; [and] (3) the error affected the appellant's substantial rights, or put differently, affected the outcome of the proceeding." *Commonwealth v. Guerrero*, 2014 MP 15 ¶ 11 (quoting *Commonwealth v. Hossain*, 2010 MP 21 ¶ 29). Nor are we the only Court to impose such burden on the appellant. In *Moses v. Union Pacific Railroad*, the Eighth Circuit stated, "to constitute reversible error [in a civil case,] . . . the burden of making a concrete showing of prejudice, resulting from improper . . . argument falls upon appellant." 64 F.3d 413, 417 (8th Cir. 1995) (internal quotation marks omitted). There, plaintiff employee filed a personal injury action against defendant railroad. Following a jury trial, the trial court entered judgment for the railroad. The plaintiff appealed arguing the defense counsel advanced improper statements during closing argument regarding his workers compensation insurance. *Id.* at 415–16. The Eighth Circuit found the statements advanced by the defense counsel to be improper, but declined to reverse the judgment because the plaintiff failed to demonstrate prejudice. *Id.* at 417.

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[1] Even in criminal cases the plain error standard applies absent contemporaneous objection. *Commonwealth v. Saimon*, 3 NMI 365, 380 (1992); *see also Commonwealth v. Hossain*, 2010 MP 21 ¶ 28 ("When a party fails to preserve its objections for appeal [in a criminal case], we are left with the option of exercising our discretion to review for plain error."). In *Saimon*, we addressed a claim of improper argument under the plain error standard where a criminal defendant failed to object at trial. There, we noted "[g]enerally, failure to object at trial precludes appellate review" but we may, in the exercise of our discretion, review for plain error but only in exceptional cases. *Saimon*, 3 NMI at 380–81.

¶ 14 The issue of who bears the burden of demonstrating prejudice in claims of improper argument in a civil context was a subject this Court had not addressed prior to *Mu*. In our 2015 opinion, we denied Oh's claim of improper argument because Oh failed to demonstrate prejudice. In doing so, we concluded the party asserting error has the burden. *Mu*, 2015 MP 18 ¶ 28. Our decision is consistent with the high threshold imposed by the plain error standard. A party who remains silent in the face of the alleged misconduct should not be allowed to benefit later from her silence. *See Hemmings*, 285 F.3d at 1193. "Requiring timely objection prohibits counsel from 'sandbagging' the court by remaining silent and then, if the result is unsatisfactory, claiming error." *Oxford Furniture Cos.*, 984 F.2d at 1129. Accordingly, we find no error in the Court's decision.

D. Demonstrative Aid in Closing Argument

¶ 15 Oh argues the Court erred in concluding the trial court did not abuse its discretion in permitting the use of demonstrative aid in closing argument. Oh concedes that demonstrative aids are generally permitted in closing argument. However, she contends the Court ignored the fact the aid was used to introduce evidence not presented at trial. Oh asserts Mu's counsel improperly utilized the aid to discuss Oh's field of vision and to suggest that Mu was on the side of the grass and off the roadway at the time of the incident, evidence of which was never proffered at trial.

¶ 16 A trial court's decision to allow the use of demonstrative aid is reviewed under the abuse of discretion standard. *See United States v. Castaldi*, 547 F.3d 699, 704 (7th Cir. 2008) ("The decision to allow the use of demonstrative exhibits is an evidentiary decision which we review for abuse of discretion."). The standard of review is whether the demonstrative aid " in question was so unfair and misleading as to require a reversal." *United States v. Crockett*, 49 F.3d 1357, 1361 (8th Cir. 1995) (quoting *United States v. Possick*, 849 F.2d 332, 339 (8th Cir. 1988)). As a general rule, an attorney may not make comments on evidence not admitted at trial. *Commonwealth v. Camacho*, 2002 MP 6 ¶ 97. However, an attorney "may argue reasonable inferences from the evidence." *Commonwealth v. Saimon*, 3 NMI 365, 385 (1992).

¶ 17 The record indicates the demonstrative aid was reasonably supported by evidence admitted at trial. First, evidence regarding Oh's field of vision was proffered. Oh testified that at the time of the incident, she was looking forward and had a clear vision without obstacles. Tr. 354–55 ("[Plaintiff's counsel]: Okay. So you are driving forward and you had a clear vision in front of you, correct? Ms. Oh: That's right."). Second, the rebuttal statement that Mu was lying on the grassy area off the roadway was also supported by witness testimony. Philip B. Quitugua ("Quitugua"), who assisted Mu at the scene, testified that Mu was lying down on the paved road to the right of a white fog line near the Sunleader store. A photograph of the area where Mu was found showing grassy patches next to the white fog line was admitted into evidence during trial, and Quitugua testified the photograph was a fair reflection of where he found Mu. While Quitugua did not expressly state Mu was lying on the grass, we determine such inference was reasonable based on the photograph admitted into evidence.

Such inference was further supported by another witness at trial, Sergeant Anthony I. Macaranas, who testified that he saw Mu lying in a grassy area on the shoulder of the road when he arrived at the scene.[2] Because the demonstrative aid was reasonably supported by evidence, we determine the Court did not err in concluding the trial court did not abuse its discretion in permitting the use of the aid.

III. CONCLUSION

¶ 18 Based on the foregoing reasons, we conclude the Court did not err, misapprehend a point of law, or overlook a factual matter. Accordingly, we DENY Oh's petition for rehearing.

SO ORDERED this 18th day of May, 2017.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
JOSEPH N. CAMACHO
Justice Pro Tem

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[2] Oh asserts Mu's counsel stated in closing that Quitugua testified seeing Mu on the side of grass before being struck by Oh's vehicle. We disagree with Oh's assertion. Based on our review of the transcript, it is clear counsel was referring to where Quitugua found Mu *after* she was struck by the vehicle:

> [Y]ou heard Mr. Quitugua say that Ms. Caiyun Mu was on the side of the grass. If the defendant was traveling slow, if the defendant was traveling slow . . . where would she be . . . in order for her to land here? I say right here. The defendant was speeding, she flew up, hit part of the car and went down. We don't know where she was, we don't know, we don't know, that's the truth . . . .

Tr. 932–33.